U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 August 2003

BALCA Case No. 2002-INA-214
ETA Case No. P2000-AZ-09472921/ML

In the Matter of:

WESTERN ARIZONA AREA HEALTH EDUCATION CENTER,
Employer,

on behalf of

GERTRUDIS BERMUDEZ-MEDINA,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Appearance: Joanne Trifilo Stark
For Employer

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Gertrudis Bermudez-Medina ("Alien") filed by Western Arizona Health Area Education Center ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A) (the "Act") and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On January 14, 1998, Employer filed an application for labor certification on behalf of the Alien for the position of Administrator, Health Care. (AF 69-70).

On October 26, 2001, the CO issued a Notice of Finding (NOF) indicating intent to deny the application on the grounds that the job requirements listed in the job advertisement were not the same as those stated in box 14 of the form ETA-750A. Therefore, the advertisement was not in compliance with 20 C.F.R. § 656.21(f) and (g). The Employer was advised to indicate a willingness to retest the labor market through a new advertisement. (AF 64-66).

In its Rebuttal dated November 30, 2001, (AF 60-63), Employer indicated that the state agency had requested some changes to item number 13 of the form ETA-750A. When the Employer made the changes, it also changed item 14 of the form ETA-750A. However, those changes were not reflected in the advertisement approved by the state agency. Employer requested that it be allowed to change item 14 to reflect the advertisement's description, and consequently not be required to revisit the recruitment efforts.

On January 29, 2002, the CO issued a Supplementary Notice of Findings. (SNOF). The CO found that the requirement of five years as a Program Director/Administrator or five years as Assistant Director/Administrator did not appear to be the Employer's true minimum requirements because the Alien did not meet those requirements when she was hired. To remedy the deficiency the Employer was asked to remove the restrictive requirement, or demonstrate that the Alien acquired the experience with another employer, or demonstrate that it was not feasible to hire someone with less than the stated requirements. (AF 47-49).

On March 4, 2002, the Employer filed its Rebuttal to the SNOF. Employer's Rebuttal included letters from previous employers, public accountants, and an affidavit from the Alien detailing the Alien's administrative experience. The Employer provided a detailed description of its business. The Employer also asserted that it was not feasible to hire someone with less experience than what it required because the organization had grown from a budget of three hundred fifty thousand dollars a year in 1987 to a budget of almost two million dollars a year. The Employer noted that the Alien had extensive experience administrating the Employer's business and also asserted that the Alien had experience in administration with her previous employers and in her own business. For those reasons, Employer concluded that it could not hire a person with less experience and that the Alien had the required experience.

On April 2, 2002, The CO issued a Final Determination (FD) denying certification. (AF 39-40). The CO found that the Alien's previous experience was not related to directing a health education center or assisting in its administration. The CO noted that if the Employer was willing to accept retail or office management experience its advertisement should have reflected that fact. However, the advertisement did not. Additionally, the CO found that the Employer did not document its allegation that it was not feasible at this time to train a new employee.

On May 1, 2002, the Employer filed a document titled Motion to Reconsider.[1] (AF 1-38). The Employer alleged that the Alien had the required experience at the time she was hired. The Employer asserted that the related occupation requirement listed in part 14 of form ETA-750A was always open to assistant administrators in any field because Employer never demanded experience in a specific field. Therefore, denial on the grounds that the Alien did not meet the requirements was an error, as the Employer clearly documented the Alien had over ten years administrative experience in three different companies.

[1] Employer's motion will be construed as Employer's Request for Review.

The Employer also alleged that the second prong of 20 C.F.R. § 656.21(b)(6) operates as a saving clause, as even if the Employer could not establish that the minimum job requirements were met, it could demonstrate that it was not feasible to hire a person with less experience due to change in circumstances.[2] The Employer alleged that due to its growth it could not afford to hire someone with less experience. In support of its position, it submitted a document that indicated the volume and quality of work it performed. Additionally, the experience the Alien acquired with the Employer was invaluable and irreplaceable. The Employer strongly urged the CO to reconsider his decision, as the Alien met and exceeded the minimum job requirements and the requirements were not tailored to the Alien.

The AF does not reflect that a brief was filed.

DISCUSSION

The regulation at 20 C.F.R. § 656.21 (b)(5) provides:

> *The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.*

Thus, the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn,* 1989-INA-105 (Feb. 14, 1990).

[2] Employer was probably intending to refer to 20 C.F.R. 656.21(b)(5).

The position for which certification is being sought is the Program Director/Administrator of a Non-profit Health Education Center. The CO interpreted Employer's minimum requirements, as stated, to be five years experience in the job offered, or in the alternative, five years experience as an Administrative Assistant. Employer's alternative experience requirement as an Administrative Assistant is logically interpreted to be in the same field as was required for experience as a Program Director, *i.e.*, Non-profit Health Education Center. Therefore, we find that Employer's alternative requirement of five years as an Administrative Assistant was correctly interpreted by the CO to be in the same industry. *Hunt Chemicals, Inc.*, 1990-INA-303 (July 22, 1991).[3]

The Employer argues that because it did not specify the industry where the applicants could have acquired the experience as administrative assistant, it meant that experience with any industry would qualify the applicants. However, the job advertisement, in relevant part, reads, "5 years experience in job or as Assistant Director/Administrator. (AF 82). It is disingenuous to claim that a potential applicant would interpret the alternative requirement, within that context, to mean experience as assistant director in any industry.

According to 20 CFR § 656.21(g)(6) the job advertisement must provide a statement of the minimum job requirements. Implicit in the process is a requirement that the newspaper advertisement and posting accurately describe the minimum job requirements in clear and unambiguous terms. The minimum job requirements and other important job information supplied by an employer are intended to insure that a satisfactory test of the labor market occurs. When an employer uses erroneous descriptions or misstates a requirement in its recruitment efforts, qualified U.S. workers may not be informed of the opportunity or be misled into not making an inquiry. (See generally *Goodhew Ambulance Services, Inc.*, 1993-INA-287 (Aug. 16, 1994).

[3] In *Hunt Chemicals, Inc.*, 1990-INA-303 (July 22, 1991), where an employer, seeking to fill the job of president of a manufacturer of chemicals, had advertised a requirement of experience in the job or, alternatively, in the related occupation of manager, we held that the alternative experience of manager was expected to be in the same field.

The advertisement in this case does not clearly describe the minimum job requirements. This type of advertising is misleading and does not provide a full and fair test of the U.S. labor market. We reject Employer's argument that, simply because the employer did not specify the field of experience, the alternative minimum job requirement refers to assistant administrators in any industry. We therefore find that the advertisement was inaccurate and discouraged otherwise qualified U.S. workers from applying for the job. Since Employer cannot require more experience from U.S. applicants than what it required from the Alien, Employer's requirement of five years experience as an assistant administrator of a non-profit health education center is not its true minimum requirement. Therefore, the job opportunity as advertised was not clearly open to any qualified U.S. worker and was in violation of 20 CFR § 656.20(c)(8). Additionally, under 20 C.F.R. § 656.21 (b)(5), as noted above, where an alien does not meet the employer's stated job requirements, certification is properly denied.

However, we note that in its Rebuttal to the SNOF, the Employer provided supporting documentation demonstrating that the Alien had previous administrative experience but did not address the Alien's lack of experience in the health education industry. Since the Rebuttal was non-responsive, it signaled that the Employer did not seem to understand the CO's grounds for issuing the SNOF. In reviewing the SNOF, we note that the CO did not clearly state his concern. In fact, not until the FD did the CO indicate with specificity that his concern was that the Alien lacked experience in the health industry.

The Notice of Findings must give notice which is adequate to provide the employer an opportunity to rebut or cure the alleged defects. *Downey Orthopedic Medical Group,* 1987-INA-674 (Mar. 16, 1988) (*en banc*). It is incumbent upon the Certifying Officer in the Notice of Findings to identify which sections of the regulations have allegedly been violated, and state with specificity how the Employer violated that section. *Flemah, Inc.,* 1988-INA-62 (Feb. 21, 1989) *(en banc).* The CO must provide instructions for rebutting and curing the violation. *Peter Hsieh,* 1988-INA-540 (Nov. 30, 1989). In this instance, the CO, in the SNOF, failed to provide sufficient information

explaining the perceived deficiency. Although we concur with the CO's finding that the Employer failed to clearly indicate its willingness to hire individuals with experience in any industry, the CO's own failure to clearly state the deficiency did not provide the Employer with proper notice. Therefore, the SNOF's improper notice caused the Employer to provide a non-responsive Rebuttal. Accordingly, this case must be remanded.

On remand, the Employer must state and advertise the actual minimum requirements for the position so that the American labor market can be adequately tested, and the CO may ascertain whether the requirements are unduly restrictive, or are not the actual minimum, and whether the Alien was qualified at the time she was hired by the Employer. *Bell Communications Research, Inc.*, 1988-INA-26 (Dec. 22, 1988). As the Employer asserts that a U.S. worker with administrative experience in any industry meets the minimum requirements, that fact must be clearly stated in the advertisement. Additionally, the advertisement must be placed not only in the classified section for the health industry, but also in the classified section where U.S. workers with general administrative experience would seek job opportunities. The latter is critical to properly test the American labor market.

The burden is upon the Employer to comply with the regulations in the labor certification process, including the need to accurately and completely follow instructions, and address those issues raised by the CO. Failure to do so will result in a denial. Employer should pay particular attention to the CO's instructions on the advertisement, which needs to accurately reflect its minimum experience requirement, and which must be placed where there is a true test of the labor market.[4]

[4] Employer's alternative remedy to the CO's finding was to demonstrate that Employer's current circumstances prevented it from training new employees. The CO in the SNOF advised Employer that it had to provide substantial documentation that would support Employer's position that it was no longer able to train new employees. However, in the Rebuttal the Employer did not provide a single document. Instead, Employer limited itself to making a series of unsupported and self-serving statements asserting that it was no longer able to train new employees. Denial of certification has been affirmed where the employer has made only generalized assertions, *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Although a written assertion constitutes a documentation that must be considered, a bare assertion without supporting reasoning or evidence

ORDER

It is hereby **ORDERED** that the Certifying Officer's Final Determination be **VACATED** and this matter be remanded to the Certifying Officer to review and determine the Employer's true minimum requirements in accordance with this decision. If applicable, the Certifying Officer shall allow the Employer to pursue the regulatory recruitment process, including re-advertisement.

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JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988). We note that in its Motion for Reconsideration/Request for Review, the Employer submitted a brochure detailing its business. However, evidence first submitted with a Request for Review will not be considered by the Board. *La Prairie Mining Limited*, 1995-INA-11 (Apr. 4, 1997); *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Assuming *arguendo* that the document was submitted timely, we would have concluded that it was insufficient to demonstrate that the Employer was unable to train new employees.

In this case, Employer failed to establish that it was unable to train new employees. Employer's statement, standing alone, is insufficient to carry the burden. The Employer bears the burden in labor certification applications both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997).

Furthermore, the Alien acquired his experience and knowledge as an Administrator of a Health Education Center with Employer, as the Alien's prior experience was limited to administration of businesses in other industries. Alien's on-the-job acquired experience cannot be counted as required experience. *Iwasaki Images of America*, 1987-INA-656 (1988).

Chief Docket Clerk
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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.